

Will the imaginary active consumers please stand up?

Case note to *Walbusch Walter Busch* (C-430/17)

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Abstract

The questions posed to the Court of Justice of the EU in the recent case of *Walbusch Walter Busch* asked what qualifies as the means of communication with a limited space or time to display the information and how detailed the disclosure on the right of withdrawal needs to be on such a medium. The judgment in this case had to strike a balance between not limiting traders' opportunities to use technological advances to reach consumers and one of the main objectives of consumer protection: ensuring consumers have a chance to make fully informed transactional decisions.

Keywords

Consumer Rights Directive, right of withdrawal, pre-contractual information, active consumers, medium of limited communication

1. Introduction

Articles 6 and 8 of the Consumer Rights Directive (CRD)¹ oblige traders selling their goods at a distance to transparently provide specific information to consumers, before consumers are bound by a contract or a trader's offer. The justification for introducing these information obligations lies in the assumed information asymmetry and, more generally, the imbalance of power between consumers and traders.² One of the most important pieces of information that consumers should receive pertains to their right of withdrawal. This right aims to counterbalance the disadvantage that consumers suffer in distance selling contracts, of not being able to see and evaluate the offered goods.³ Without information about their right of withdrawal, consumers may not know they can terminate the transaction without having to give any reason for it, or that they only have a limited period to do so. Therefore, Article 6(1)(h) CRD obliges traders to inform consumers as to whether they have a possibility to use their right of withdrawal in a given transaction, its conditions, time limits and how they could exercise that right. Moreover, although consumers may choose how they want to withdraw

from a contract, the same provision obliges traders to issue a model withdrawal form, which has been standardized in the Annex I(B) to the CRD. The European legislator deemed the standardized model withdrawal form to guarantee transparency, legal certainty and facilitate a possibility of the consumer's withdrawal.⁴

Still, the European legislator remains aware that nowadays an increased number of consumers conclude transactions at a distance through technologies limiting a possibility of making full disclosures of all contractual terms. For example, when consumers shop online on a smartphone, the phone's display may hinder scrolling through the pages of pre-contractual terms and conditions.⁵ Therefore, Article 8(4) CRD releases traders from their obligation to provide all mandatory pre-contractual information to consumers through the means of communication with a limited time or space to display this information, when such a medium is used to conclude the transaction. Instead, traders may use alternative ways of pre-contractual disclosure to either deliver the remaining mandatory information or to make it available to consumers. However, considering the importance of the right of withdrawal for consumer protection, regardless of the medium used to conclude the contract, traders need to provide consumers with information about this right.

The questions posed to the Court of Justice of the EU (CJEU) in the recent case of *Walbusch Walter Busch*⁶ asked what qualifies as the means of communication with a limited space or time to display the information and how detailed the disclosure on the right of withdrawal needs to be on such a medium. The judgment in this case had to strike a balance between not limiting traders' opportunities to use technological advances to reach consumers and one of the main objectives of consumer protection: ensuring that consumers have a chance to make fully informed transactional decisions.⁷

2. Facts

A German clothing company, Walbusch Walter Busch, conducted its business by offering consumers a mail order option. Consumers received multiple pages of advertising leaflets, tucked in newspapers or magazines, containing information about Walbusch Walter Busch's products. If a particular product appealed to consumers, they could detach a part of the leaflet and use it as a mail order coupon. Sending a mail order coupon led to the conclusion of a distance selling contract with Walbusch Walter Busch. The mail order coupon provided information to consumers about Walbusch Walter Busch, including its website address and mentioned, but did not specify, the existence of the consumers' right of withdrawal. Further information on the right of withdrawal and the model withdrawal form could be found on the trader's website, under the tab 'AGB', which is an abbreviation for the German *Allgemeine*

Geschäftsbedingungen (general conditions of sale).⁸ A German association fighting against unfair commercial practices, Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main, considered the lack of provision of the model withdrawal form to consumers together with the leaflet infringed formal information requirements placed on traders by the CRD.⁹

3. Judgment

It is possible to distinguish two separate elements in the judgment, regarding the scope of the notion of the means of communication with a limited time or space for the display of the information and regarding the provision of the information on the right of withdrawal itself. These two issues will now be discussed in turn.

A. Means of communication with a limited time or space to display the information

To assess whether in a given case Walbusch Walter Busch properly fulfilled its disclosure obligations, the national court had to consider whether this trader could benefit from an exemption, as provided in Article 8(4) CRD. The exemption allows traders to provide only essential pre-contractual information through the means of communication used to conclude a contract, while disclosing all other pre-contractual information through another medium of communication. As this exemption is only available if the means of communication used by the trader limits the time or space for a display of the information, it was necessary for the CJEU to guide the national court in ascertaining the scope of that notion.

The CJEU recognized that, due to technical constraints, certain media are unsuitable for providing full pre-contractual disclosures to consumers.¹⁰ Examples of such media include smartphones, as their screens allow the display of a limited number of characters, and a television sales spot, which limits the amount of information that could be effectively conveyed to consumers due to its short duration.¹¹ It needs to be highlighted that the CJEU does not require traders to bear a higher cost for using a particular medium of communication, only to ensure that consumers receive all information. We could stipulate here that a trader could provide all required information in a television sales spot, but this would likely prolong its screening time, which is costly. Here the Court balances the need to protect consumers with the need to facilitate trade in the internal market and recognizes it is not only the inherent character of the medium used, but also the trader's economic choice that may limit the time or space for a display of the mandatory information.¹²

When a national court assesses the character of a given medium of communication, trying to establish its limited character, it needs to account for all technical features that facilitate communication. Moreover, the evaluation of whether all pre-contractual information could be communicated effectively through that medium needs to be objective.¹³

Therefore, it should not matter what choices a given trader has made, for example, when choosing a particular type or size of font for communicating the information to consumers, but rather what was reasonably feasible. The feasibility assessment could be an estimate, for example, the smallest font that an average targeted consumer could read.¹⁴ Consequently, a trader may not defend their lack of disclosure with an argument of a limited space of the chosen medium of communication, if this trader chose to use a particularly large font that allowed them only to convey a few words to consumers.

It is worth mentioning separately that the CJEU uses the benchmark of not just an average consumer, that is a reasonably well-informed, observant and circumspect consumer,¹⁵ but an average consumer of a targeted group. This will allow national courts to pay attention to the vulnerabilities of consumers who have been targeted by a given communication. As an example, national courts in the *Walbusch Walter Busch* case could consider the chosen medium of communication, that is advertising leaflets, often target elderly consumers, who might require the use of a bigger size of font to make the communication accessible.¹⁶

B. Information on the right of withdrawal

When traders use a medium of communication with a limited time or space for a display of the information, Article 8(4) CRD allows them to provide all non-essential mandatory information to consumers through other communication sources. However, the communication still needs to occur in the pre-contractual phase of the transaction. Whilst providing an exemption, this provision lists the information on the right of withdrawal as part of the essential pre-contractual mandatory information. Consequently, consumers need to receive such information through the same means of communication that are used to conclude the transaction.¹⁷

According to the CJEU, however, the above-mentioned obligation does not go as far as obliging traders to deliver a model withdrawal form to consumers through such limited means of communication.¹⁸ The Court justifies this reasoning in two ways. First, if a trader informs consumers of the existence, or the lack thereof, of the right of withdrawal through the means of communication with a limited time or space for a display of the information, then consumers already know about their right of withdrawal. The attachment of a model withdrawal form would not provide them with any additional information, which could be relevant at the stage of deciding whether to conclude a given contract. Second, if traders were always obliged to deliver the model withdrawal form through the medium of communication

also used to conclude a transaction, it could significantly limit their marketing capabilities. For example, it would no longer be possible to conclude contracts on a phone.¹⁹

This does not release traders from an obligation to provide a model withdrawal form to consumers in the pre-contractual phase of a transaction. This model withdrawal form, together with all other non-essential information, should be given to consumers through another source of communication and in a transparent manner.²⁰ As an example of other means of pre-contractual communication that traders could use, the CJEU lists a toll-free phone number or a hyperlink to the trader's website.²¹ The important element of the compliance test is whether a consumer could access the remaining mandatory disclosures easily and directly.

4. Will the imaginary active consumers please stand up?

Although consumer transactions tend to expose the information asymmetry between the parties concluding them, the risk increases with distance-selling contracts. When consumers have no opportunity to physically examine the goods or ask questions about their characteristics directly to traders, they are also less likely to make informed transactional decisions.²² This may explain the abundance of mandatory information obligations in distance-selling contracts and their status as one of the key measures of consumer protection through which the European legislator hopes to reach consumers and restore the contractual balance.²³

However, based on the evidence gathered in empirically conducted research, many scholars have claimed that consumers do not pay attention to pre-contractual disclosures and, even if they do, they are likely unable to understand such disclosures.²⁴ Disappointingly, the CJEU's judgment does not seem to take into consideration these findings that consumers are hard-pressed to devote their resources to finding and deciphering the pre-contractual information. If consumer protection measures aim at providing consumers with the mandatory, pre-contractual information in a model withdrawal form, then traders should be obliged to do more than just make such information available to consumers.²⁵ After all, behavioural studies show we cannot count on consumers to actively access such information, as traders actually struggle to attract consumers' attention despite their use of various marketing strategies.²⁶ This is, however, the solution the CJEU supports when suggesting a trader could limit itself to providing a toll-free phone number or a hyperlink to a website with terms and conditions. Essentially, either option would require consumers to act to obtain this information, which remains unlikely. Moreover, the CJEU did not consider, or advise the national court to check, whether consumers of Walbusch Walter Busch, who were concluding

their contracts through a mail order form, could access the Internet to visit the trader's website.

In this respect, it is worth noting the difference between the previously binding Distance Selling Directive²⁷ and the CRD.²⁸ The previously binding rules were interpreted by the CJEU as requiring traders to actively provide the pre-contractual information to consumers.²⁹ The European legislator introduced a different language to the CRD, however, which now the CJEU seems to have interpreted as allowing traders to count on the consumers being active in this regard.

Of course, we need to remember that consumers' interests are not the only ones that EU consumer law serves, as ultimately it intends to contribute to the good functioning of the internal market.³⁰ However, the above-described reasoning of the CJEU is not the only way to guarantee the balance between the divergent needs of consumers and traders. Namely, although the CRD allows traders to use alternative media to communicate with consumers, this opportunity could be linked to an obligation to push some information in the consumers' direction. In practice, a trader could be obliged to call a consumer and orally explain the model withdrawal form, instead of just providing a toll-free phone number. Alternatively, a trader could send an email to consumers with a model withdrawal form, instead of expecting them to find it on its website. Both these solutions are technologically feasible, as a trader would have access to the consumer's contact data and this is likely less costly than extending the use of a communication source with limited space or time to display all the pre-contractual information. More importantly, the CJEU could have used provisions of the CRD to place such obligations on traders, by interpreting the traders' obligation to 'give' information to consumers from Article 6 CRD as not requiring any activity on the side of consumers in accessing this information. Simultaneously, the CJEU could have highlighted that the other part of this provision referring to 'making information available' to consumers should be interpreted as not placing an obligation on traders to ensure consumers read such disclosures.

What the CJEU could not address, but is nevertheless worth further elaboration, is whether we need model withdrawal forms at all. The CJEU could not question their purpose, as the CRD envisages their provision to consumers. As it has been mentioned above, Recital 44 CRD explains that a standardized model withdrawal form aims to eliminate differences in the exercise of the withdrawal right by consumers in various Member States. This solution aims to reduce traders' costs arising from having to comply with various information requirements in different Member States. Therefore, the purpose of introducing this specific

information obligation is not related to consumer protection. This is self-explanatory if we consider that consumers may withdraw from a contract in any form and not just by using a model withdrawal form. The use of such a form might take longer, as there would be specific text to read and complete, compared with simply calling or emailing the trader. Previous research showed that information provided in a text box or a table could insufficiently inform consumers or be confusing.³¹ Considering traders still need to allow consumers to withdraw from a contract in any form and the model withdrawal form is at best just a guideline for consumers, we may wonder how beneficial these model withdrawal forms are for traders themselves,³² particularly if they lead to additional problems in providing consumers with the mandatory information, by extending its length. This case might be a good indication for the European legislator to either re-think the optional character of model withdrawal forms for exercising the right of withdrawal or their existence altogether. The first option would be detrimental to consumers, as prescribing the mandatory use of the model withdrawal form would place additional formal limitations on exercising the right of withdrawal. The second option, that is disposing of model withdrawal forms, does not seem to make much of a difference for traders', if the Member States continue to be prevented from adopting their own national model withdrawal forms by the full harmonization character of the CRD.

To conclude, in this judgment the CJEU follows the path set by the European legislator, but it is not paved with perfect solutions, neither to ensure the protection of consumer rights nor to strengthen the traders' market position. Especially disappointing is that the CJEU seems to expect imaginary active consumers to stand up for themselves by actively accessing the pre-contractual information.

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Notes

1 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L 304/64 ('Consumer Rights Directive').

2 See e.g. N. Helberger, 'Forms matter: Informing consumers effectively' *BEUC* (2013), https://www.beuc.eu/publications/x2013_089_upa_form_matters_september_2013.pdf; O. Seizov et al., 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU', 42 *Journal of Consumer Policy* (2019) , p. 151-152.

3 See e.g. J. Luzak, 'To Withdraw or Not To Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking Into Account Its Behavioural Effects on Consumers', 37 *Journal of Consumer Policy* (2014), p. 91-92.

4 See Recital 44 Consumer Rights Directive.

5 DG Justice European Commission, 'Guidance Document concerning Directive 2011/83/EU', *European Commission* (2014), https://ec.europa.eu/info/sites/info/files/crd_guidance_en_0.pdf, p. 33.

6 Case C-430/17 *Walbusch Walter Busch* EU:C:2019:47.

7 Ibid., para. 41.

8 Ibid., para. 18.

9 Ibid., para. 19.

10 Ibid., para. 37.

11 Ibid.

12 Ibid., para. 38.

13 Ibid., para. 39.

14 Ibid.

15 See e.g. Case C-210/96 *Gut Springenheide* EU:C:1998:369, para. 31.

16 See also A. Jabłonowska, 'Disclosure duties versus freedom to conduct a business: CJEU partially departs from AG's opinion in C-430/17 *Walbusch Walter Busch*', *Recent Developments in European Consumer Law* (2019), <http://recent-ecl.blogspot.com/2019/01/disclosure-duties-versus-freedom-to.html>.

17 Case C-430/17 *Walbusch Walter Busch*, para. 44.

18 Ibid., para. 46.

19 Ibid. The Guidance on the CRD issued by the European Commission explains that when a contract is concluded on the phone, traders should explain the content of the model withdrawal form to consumers orally instead, see: DG Justice European Commission, p. 34.

20 Case C-430/17 *Walbusch Walter Busch*, para. 46.

21 Ibid., para. 37.

22 See e.g. J. Luzak, 37 *Journal of Consumer Policy* (2014).

23 See e.g. N. Helberger, 42 *Journal of Consumer Policy* (2019).

24 See e.g. O. Ben-Shahar and C.E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press, 2014); I. Ayres and A. Schwartz, 'The No-Reading Problem in Consumer Contract law', 66 *Stanford Law Review* (2014), p. 545-610; Y. Bakos et al., 'Does anyone read the fine print? Consumer attention to standard-form contracts', 43 *Journal of Legal Studies* (2014), p. 1-35; E. Seira et al., 'Are Information Disclosures Effective? Evidence from the Credit Card Market', 9 *American Economic Journal: Economic Policy* (2017), p. 277-307; O. Bar-Gill, *Seduction by Contract* (Oxford University Press, 2012), p. 280.

25 See e.g. J. Luzak, 'Online Disclosure Rules of the Consumer Rights Directive: Protecting Passive or Active Consumers?', 3 *Journal of European Consumer and Market Law* (2015), p. 79.

26 G.R. Milne and M.J. Culnan, 'Strategies for Reducing Online Privacy Risks: Why Consumers Read (or Don't Read) Online Privacy Notices', 18 *Journal of Interactive Marketing* (2004), p. 17, 19, 25; S. Harridge-March, 'Can the Building of Trust Overcome Consumer Perceived Risk Online?', 24 *Marketing Intelligence & Planning* (2006), p. 754-755; J. Wirtz et al., 'Causes and Consequences of Consumer Online Privacy Concern', 18 *International Journal of Service Industry Management* (2007), p. 341.

27 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L 144/19 ('Distance Selling Directive'), repealed by the new provisions of the CRD.

28 See for the comparison of DSD and CRD provisions: J. Luzak, 3 *Journal of European Consumer and Market Law* (2015), p. 82-85. The DSD required consumers to 'be given' or 'be provided with' information, whilst the CRD specifies traders' obligation to 'give' or 'make available' this information.

29 Case C-49/11 *Content Services* EU:C:2012:419, para. 32-35.

30 Recital 5 CRD.

31 The Gallup Organisation, 'Testing of a Standardised Information Notice for Consumers on the Common European Sales Law', *The Gallup Organisation* (2013), https://ec.europa.eu/info/files/standardised-notice-common-european-sales-law_en.

32 The introduction of the model withdrawal form has so far been uncritically accepted as beneficial for consumers, see e.g. C. Cauffman, 'The Consumer Rights Directive – Adopted', 19 *Maastricht Journal of European and Comparative Law* (2012), p. 215; S. Weatherill, 'The

Consumer Rights Directive: How and Why a Quest for “Coherence” Has (Largely) Failed’,
49 *Common Market Law Review* (2012), p. 1296.